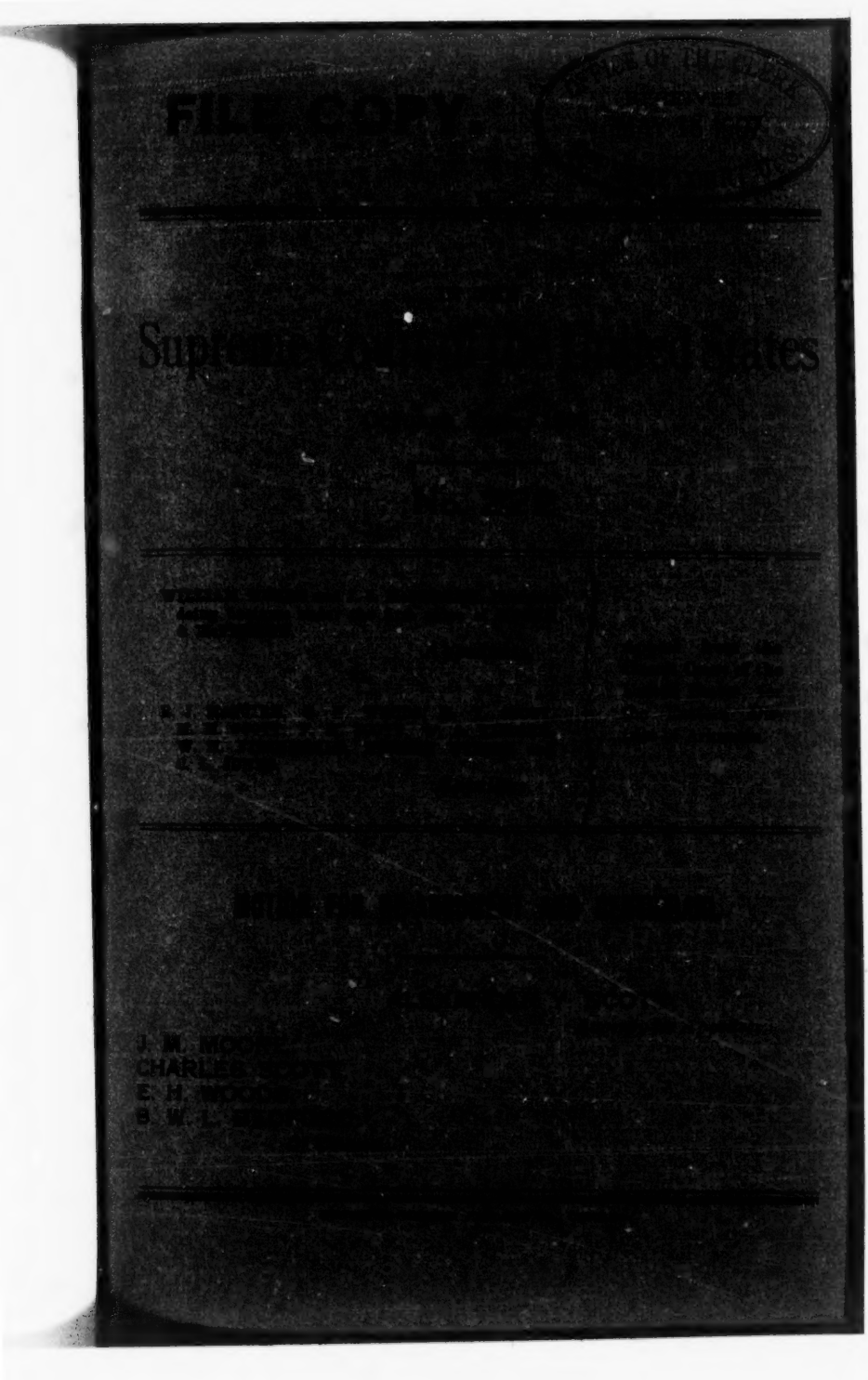


IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 222

WILLIAM MOORE and J. S. McFERREN, Partners doing business under the firm name of MOORE & McFERREN, *Appellants,* *vs.* **R. J. McGUIRE, E. H. WOODS, M. Y. SCOTT, M. M. SCOTT, E. M. SCOTT, W. A. YERGER, W. H. FITZGERALD, HUBERT WILSON and C. L. JONES,** *Appellees.*	Appeal from the Circuit Court of the United States, for the Eastern District of Arkansas.

MOTION FOR RE-ARGUMENT AND CERTIORARI.

Now come the appellees herein by their solicitor, Alexander Y. Scott, and petition the court for a writ of certiorari directed to the Hon. W. R. Field, clerk of the Circuit Court of the United States for the Eastern District of Arkansas in the Western Division thereof, requiring the said W. R. Field to certify to this Honorable Court so much and such parts of the original evidence introduced at the trial of the said cause as follows, to-wit:

1. Entire Exhibit "B" to E. N. Nall's deposition being field note books 8/B and 17/F.

2. Maps of Township 21, Range 8 West, filed as exhibit ..... to E. H. Nall's deposition and Exhibit "C" to Wm. McAndrew's deposition.

And for cause of petition show unto your Honors that the record of said originals does not conform in many particulars to the originals so filed, and that an inspection of the originals so filed is believed to be necessary that justice may be done and a correct and full idea of the exhibits so filed be had by the court.

Appellees file herewith as Exhibit A certified copy of Exhibit 8/B to E. H. Nall's deposition.

Appellees also move the court for a re-hearing of said cause and a re-argument thereof in this Honorable Court.

ALEXANDER Y. SCOTT,
Solicitor for Appellees.

IN SUPPORT OF SAID MOTION APPELLEES FILE THE FOLLOWING SUGGESTION OF ERROR AND ARGUMENT THEREON:

MAY IT PLEASE THE COURT:

The decision of this Honorable Court is so profoundly respected by me that under hardly any circumstances, except those peculiar to this case, would I have the temerity to file a suggestion of error and motion for a re-argument. The case in point, however, presents the exception, because the court has, it is believed, been led into errors of facts by the failure of the record to properly reproduce the Field notes, Exhibit "B" to E. H. Nall's deposition and a clear and patent error of the court and counsel for the appellants, unreplied to by either brief or oral argument of appellees.

The opinion of the court establishes this fact conclusively, and it is because of this alone that I venture to file a suggestion of error and rely with so much confidence upon the court granting a re-argument.

The opinion of the majority of the court, rendered by Mr. Justice Holmes, whose opinions I have learned to regard with peculiar reverence, at page four, sheet opinion, says:

> *"The next map, however, is more definite. It is a map of Township* 21, *Range* 8 *West, Mississippi, said to be projected from the field notes of Benj. Griffin, also produced, made in January and February,* 1830. *Here the island is divided up as a part of the township, although not sectionized under the United States statutes and there are other slight indications that the draftsman regarded the island as belonging to Mississippi. This map is more or less counteracted by another map*

of the same township and signed by Benj. Griffin which does not sectionize the island, and indicates, if it indicates anything about it, that the channel is on the East Side. The field notes in two places speak of 'where the west boundary comes to the river' and they give the width of the east channel at the top as 2,920 feet. The defendants contend that the first mentioned of these maps is the complete work, but that hardly can be said to be proved."

The field notes of Township 21, Range 8, and the map projected therefrom is a most accurate and important piece of evidence and is introduced in the record for the purpose of establishing the fact that *in the year* 1830, *the channel of the Mississippi River was west of Island* 76, *and at that date Benj. Griffin, Deputy Surveyor of the United States Government, and his assistants sectionized and surveyed the island as a part of the State of Mississippi, and left indefaceable evidence of where the channel of the Mississippi ran at that date.*

If, then, the court has misunderstood this official, positive and record evidence, it is not strange that it should have failed to sustain the finding of the learned judge below, who had the advantage of some three days' oral argument upon the original copies of plats and field notes produced before the court below.

I have quoted from the learned opinion in this case only the facts as above, because if I can point out to the court a clear misconception of facts, due to a clear misunderstanding of this survey, I am confident that they will speedily remedy same by affording an opportunity for a full discussion before the court of the

entire record. The cause of the error into which the court seems to have been led, is due, it seems to me, to misunderstanding of counsel for appellants clearly demonstrable from the printed brief they have filed in this case and that portion of the argument in said brief which is to be found on page 43 thereof, aided by the failure of the record to convey to the mind a full understanding of the entire Exhibit B to E. H. Nall's deposition.

The first error of the court that I point to is as follows: The court says: "They (the field notes) give the width of the east channel at the top as 2,920 *feet.*" In appellants' brief at page 43 we find this statement: "that at the head of the east channel (as shown by field notes) it was 2,920 *feet* (page 213)." Emphasis mine.

This is an error the court and probably the counsel fell into because of the numerals 2920 on page 213 of the record about the middle of the page, supposing the numerals 2920 to indicate *feet.* I will discuss the entire field notes fully hereafter but for the present we will consider the language of the record. At page 213 of the record appears the following:

> "*distance X the shoot of Island 76 from the beginning of the last St. N. 40 E. 2920 intersecting the opposite traverse 26 ch. on the 1st St.*"

Both counsel and court assume that the 2920 means *feet.* This is clearly an error. The correct distance is not 2920 feet, but 29.20 chains—29 chains and 20 links.

Without reference to the deposition of Andrews, this is apparent from the *entire field notes as well as from the universal custom of land surveying, for dis-*

tances in surveying are measured not by feet and inches, but by chains and links.

Thus, an examination of the entire field notes forming Exhibit "B" to E. H. Nall's deposition, beginning at page 213 and ending on page 234, will show that no where in the field notes are feet mentioned, *but that every distance is referred to in chains and links.* Not only is this true of the Benj. Griffin survey, but of the field notes of the Pelham survey beginning on page 173. And on every map filed in this cause the distances are given in chains and links. Every survey made by the United States Government is so made, and nowhere do we find a surveyor referring to distance in yards, feet or inches, but always as chains and links. So the map of Benj. Griffin survey (page 234) contains at the head "N. 40 E. 29.00," clear 29.00 chains and meaning the 29.20 chains of the field notes. Andrews says, record page 261:

> "The distance at the head of the island is designated on the map as 29 chains."

Andrews speaks in chains. So Shackelford speaks in chains (see answer to interrogatory 13, page 252). In addition to this the instructions of the government office required the surveyors to express distance in terms of the "four pole chain of 100 links." I find the foregoing at page 203, "Manual of Land Surveying," by F. Hodgman, edition of 1900, and also find at page 193 of the same work the same instructions for the year 1815, which likewise required distances to be given in chains and links. I have not the full instructions before me, but it is perfectly clear the distance here meant is 29.20 chains. I have been unable to procure

a full copy of the land department instructions for original surveys in force in 1830, but from an examination of all original field notes I have seen it is clear all distances were given in chains and links, and unless chains and links are here meant--there is just as much reason to call it *inches* as *feet* or yards as inches. The distance is clearly expressed in terms of land surveyors.

Thus, then, written out in full the above quotation would read:

> "Distance across the shoot of Island 76 from the beginning of the last station North forty degrees East 29.20 chains, intersecting the opposite traverse 26 chains on the first station."

There is quite a difference between 2920 feet and 29.20 chains. The latter distance, that is 29.20 chains, equals 1927.20 feet, which means to say that the shoot is nearly 1,000 feet less in width at the head than the court has been led to believe by appellants' brief and by the error in supposing the numerals 2920 to refer to feet. The error of the court in supposing the distance, in view of the record, to be 2,920 feet is easily understood, but it is more difficult to understand, in view of Mr. Shackelford's and Andrews' depositions and the cross-examination by counsel of Mr. Andrews, how counsel misunderstood the 2920 of the field notes to mean 2,920 feet and the 29.00 entered on the Benj. Griffin map of 1830. opposite page 234, to mean 2,900 feet.

I have thus called the court's attention to this error for I deem it important, and one of the inducing causes of the chief error of the court in regard to the Benj. Griffin survey of 1830 and the map projected from that

survey opposite page 234 of the record, which error is shown in that part of the court's opinion first quoted above, that is to say: *"The map is said to be projected, —etc.—made in January and February,* 1830" and *"The island is divided up as a part of the township, although not sectionized under United States statutes"* and *"The map is more or less counteracted by another map etc."* These errors in the opinion of the court having been induced by the failure of the record to fully represent the field notes.

I shall later take occasion to comment upon the remarkably artificial argument to be found on page 43 of appellants' brief with regard to distances scaled across the shoot of the island on the various maps projected from the various field notes, and introduced into evidence.

If the court will patiently follow me I will, at the risk of tediousness, do that which could be more thoroughly done in oral argument, that is, demonstrate to, I had almost said, a mathematical certainty, I do say to a moral certainty, that the survey of 1830 made in January, February and October by Benj. Griffin is a careful and painstaking survey just as that subsequently made in 1846 by Mr. Pelham is, and is just as reliable and is to be as much depended upon to show the whereabouts of the channel in 1830 as the Pelham survey is to show the whereabouts of the channel in 1846 and *that Benj. Griffin, Deputy Surveyor of the United States, did in* 1830 *sectionize the island under the United States statutes as a part of the State of Mississippi and that in* 1830 *it was impossible that the main channel of the Mississippi River should have run east of Island* 76.

For a complete understanding of this survey of 1830, we must first clearly understand the entire exhibit "B" to E. H. Nall's deposition. This exhibit in the record is shown to begin on page 213 and to extend to page 234. This entire exhibit forms the field notes of Township 21, Range 8 West, State of Mississippi. This exhibit is made up of *two separate field-note books*, that is to say, one of the field-note books and one part of the exhibit, being marked 17/F, begins on page 216 of the record and extends to page 233 of the record. It must be understood that this part of exhibit "B," that is 17/F, constitutes a *separate* and *distinct field-note book*, as is shown by the certified copy of the original introduced into evidence in the court below. At the end of this part of the exhibit on page 233, the following words appear: "*Recorded April 9th*, 1830. *T.* 21 *R.* 8 *W. Choctaw District, Surveyed by Benj. Griffin D. S. in January and February* 1830." On page 234 is the certificate of E. H. Nall, Land Commissioner of the State of Mississippi, stating that he has in his keeping the records of the "Surveyor General's Office" and he certifies that the foregoing is a correct transcript from said records in so far as it is shown in field-note book 17/F of the original survey now on file. This part of exhibit "B" standing alone, would indicate that it was the entire field notes of Township 21, Range 8 West, State of Mississippi, but there is in the land office at Jackson a field note book marked 8/B. This field note book, 8/B, contains the complete field notes of Township 22, Range 8 West, as well as field notes of fractional Township 22, R. 9 W., and Fraction Township 21, R. 10 W., and Fractional Township 21, R. 9 West.

In other words, exhibit 8/B is the original field note book of the original field notes of Township 22, Range 8 West, as well as the last mentioned three fractional townships, and is the original field-note book on file in the land office at Jackson, Miss. (See E. H. Nall's deposition and the cross-examination of D. E. Myers, pages 208 and 209.) That part of said original field-note book copied in the record, gives the survey of Island 76 and begins in the record on page 213 and extends to page 215. (Hereafter herein, I shall refer to the Exhibit 8/B as the field-note book of Township 22, R. 8 West, for the sake of brevity, but it will be remembered that this book contains the original field notes from the original survey of the fractional townships as above stated as well, all being a part of the State of Mississippi and surveyed and sectionized in 1830 and 1831 by Benj. Griffin, Deputy Surveyor.) This field-note book, designated as 8/B, containing the original and official surveys and sectionizing of the several townships above mentioned, which were surveyed and sectionized under the United States statute, and likewise contains the original survey and sectionizing of Island 76 and *is as official for the island as for any other part of the survey.*

The asterisks interspersed through this part of E. H. Nall's Exhibit 8/B indicate that the complete field-note book 8/B has not been copied, but only so much thereof as has reference particularly to Island 76 and its traverse, and connecting it with the main shore of Mississippi. Field-note book 8/B, then is contained in a separate book and constitutes the original field notes of Township 22, Range 8 West, State of Mississippi as surveyed by Benj. Griffin in October, 1830.

Field-note book 8/B, beginning on page 213 of the record, begins thus:

> "Field notes of Township No. 22, in Range 8 West in the Choctaw District of Mississippi, Surv'd by Benj. Griffin, Dep. Surv. 1830 T 22 R 8 W
> Traverse of Island 76 beginning at the Upper end"

Following below and to the left of the page is the traverse of the island with stations, course and distance, and extending from Station one on through, and containing a survey of the entire island, surveying and sectionizing the island as *Sections* 6 *and* 7 *of Township* 22, *Range* 8 *West, State of Mississippi, and dividing Section* 6 *into Lots* 1 *to* 8, *inclusive, and Section* 7 *into Lots* 1 *to* 3, *inclusive.*

At the end of field-note book 8/B the following words are written: "Finis. T. 22 R. 8 W. 1830, October 30." page 215 of the record. Then follows the certificate of E. H. Nall, Land Commissioner, who certifies that he has in his official keeping the records of the "Surveyor General's Office," and that the foregoing pages are true and faithful copy, or transcript of and from the said records in field-note book 8/B of the original surveys now on file and in his keeping as a part of the record of the said land office.

Thus, then, it is found that Island 76 was originally surveyed and sectionized in October 1830, as Sections 6 and 7 of Township 22, Range 8 West, *and was surveyed by Benj. Griffin, Deputy United States Surveyor, being a survey made by him on the ground and contained in the original field-note book of said survey now on file in the proper official department in Jackson, Mississippi.*

The contention of the defendants is that the two field-note books above containing the field notes of the main land of Township 21, R. 8 W., and the field notes of the survey and traverse of Island 76 form the complete set of field notes of Township 21, Range 8 West, and that the complete field notes of Township 21, Range 8 West, contains 37 sections and that the map opposite page 234 is projected from the survey made by Benj. Griffin in January and February, 1830, *and* from the survey made by Benj. Griffin in October, 1830, jointly and not alone from the survey made by Benj. Griffin in January and February, 1830, and that the two surveys thus form the complete field notes of Township 21, Range 8 West, as surveyed and sectionized under the United States statutes by Benj. Griffin, Deputy Surveyor for the State of Mississippi.

For a more complete understanding of what now follows, it is necessary to bear in mind that Township 22, Range 8 West, is directly North of Township 21, Range 8 West, and that they are adjoining townships. Benj. Griffin surveyed and sectionized both Township 21 and 22, Range 8 W., State of Mississippi. In the survey of January and February, 1830, of Township 21, R. 8 W., he surveyed only the *main land as is shown by exhibit* 17/F, beginning on page 216 and ending on page 233 and nowhere in the said survey and exhibit does he make reference to Island 76, but exhibit 17/F sectionized Township 21, Range 8 West, as containing only 35 sections, all of which are on the main land and there is no scale of measurement on the island, nor from the main land to the island. Nowhere within the entire field notes of 17/F is Island 76 mentioned

in any form, shape or manner. Thus a true map projected from the field notes 17/F would not even sketch in Island 76, for no reference is made to the island even in the remotest manner.

We now come to consider exhibit 8/B beginning on page 213. As stated above this is field-note book of Township 22, Range 8 West, and this township lying directly north of Township 21, Range 8 West, was surveyed and sectionized in October 1830, that is, in the Fall of the same year in which Township 21, Range 8 West, was sectionized and both townships were surveyed and sectionized by Benj. Griffin. Upon examining these latter field notes, we find that in October, Benj. Griffin began a survey of Township 22, Range 8 West, in Mississippi, and he began with the "Traverse of Island 76, beginning at the upper end," page 213. From the first station at the upper end of the island, the surveyor runs entirely around the island, as stated above, sectionizing the island as Sections 6 and 7 of Township 22, Range 8 West, Choctaw District of Mississippi and in field-note book 8/B the island stands sectionized *originally* as a part of Mississippi and as a part of Township 22, Range 8 West, all of which is contained in the original survey and field notes of the said township. Not only in this survey are Sections 6 and 7 of Township 22, Range 8 West, carefully divided into lots, but the acreage of each lot is given, course and distance of each lot and the entire acreage of the island, showing a most painstaking and careful survey of the island at that date.

But what now seems to follow in this original note book in the official keeping of the Land Commissioner

at Jackson, and being the original survey of Township 22, Range 8 West?

On the same page and to the right of the letters and figures giving course and distance, the following words are written in *red ink:*

> *"Island 76 is in Township 21, Range 8 West and not in T. 22 R. 8 W. and instead Sections 6 and 7, should be sections 36 and 37 of Township 21 Range 8 West."*

And just below in *black ink:*

> *"This island is properly within Township No. 21 Range 8 West."*

And on a slip of paper pasted in the book the following:

> *"distance X shoot of Island 76 from the beginning of the last St N 40 E 2920 intersecting the opposite traverse 26 ch on the 1st St."*

Here, then we find that Island 76 was surveyed as a part of T. 22 R. 8 W., Mississippi, by Benj. Griffin in October, 1830, and carefully sectionized under the laws of the United States and that the said Benj. Griffin measured the distance from the head of the island "X the shoot of island 76"—not across the river—and found the said shoot to be 29.20 chains. That is, that he surveyed and sectionized the island as a part of the State of Mississippi, found the *"shoot"* and not the channel of the river was between the island and the main shore of Mississippi and that the island was a part of the State of Mississippi.

When the course and distance to the main shore was found, it was found that instead of the island falling properly in and as a part of T. 22, R. 8 W., the head of the island fell just below the north line of T. 21,

R. 8 W., and so the surveyor went carefully over his field notes and where the words "Section 6" appear, the words are written in *red ink* "Should be section 36, T. 21 R. 8," and where "Section 7" appears the words are written in *red ink* "Should be section 37, T. 21 R. 8 W."

Thus is amply shown the fact that Mr. Griffin who made this survey, first sectionized the island as a part of Mississippi and as a part of T. 22, R. 8 W., but subsequently finding that instead of being in T. 22, R. 8 W., in the State of Mississippi, that it was properly in T. 21, R. 8 W., in the State of Mississippi, carefully corrected the error with red ink, so as to call prominent attention to the fact that the island was in T. 21, R. 8 W., and not in T. 22, R. 8 W., as first surveyed.

Understanding, now, the *two* field-note books, being the field notes of T. 21 and T. 22, R. 8 W., Mississippi, we are in position to discuss the maps filed opposite page 176 and page 234. And first the map opposite 176.

This map is projected from *a set* of field notes, that is, the map is correct and reliable only to the extent that it conforms to the field notes from which it is projected. The field notes are the record of the actual survey and form the original data made by the surveyor on the ground, and the field notes and not the map, sectionize the various townships and note the actual condition of the territory, the map being merely a pictorial representation for the eye of the conditions found by the surveyor and placed in enduring form by course and distance in his field-note book.

> "Original surveys are the surveys which are first made for the purpose of locating on the ground the boundaries of tracts of land marking them by

visible objects. This work is called field work. A full description of what is done is kept by the surveyor and is called the field notes. *The field notes furnish the data from which to make a map of the land and calculate the area.*"

A Manual of Land Surveying, by F. Hodgman, page 1.

What then, does the map opposite page 176 represent and from what is it taken? Mr. Andrews in his deposition, page 274, says, referring to this map: "The map conforms to the field notes as shown in exhibit 'B' to Mr. Nall's deposition and marked 17/F. That is the map marked exhibit 'D' to my deposition." Field notes 17/F begin on page 216 of the record and extend to page 233. From the beginning to the end of these field notes, Island 76 is not mentioned. The distance from the mainland to the island is not mentioned and hence, the island must simply have been sketched in without any regard to scale. That is, the map being a correct representation of the field notes, is only drawn to scale as to that part of the map taken from the field notes. To establish this conclusively, Mr. Andrews' deposition is not necessary. It is simply necessary for the court to read the field notes 17/F and it will see there is no distance given across the shoot and the island is in no way connected with the main shore. This being the case, the map stands as a representation of 17/F, which is the main land of Mississippi and is that part of Township 21, Range 8 West, Mississippi, surveyed in January and February, 1830, by Benj. Griffin and containing *thirty-five sections. The plat of this survey being made May* 31, 1830, *several months prior to the survey of Township* 22, *Range* 8 *West, in October,* 1830,

when the distance across the shoot was measured by Mr. Griffin.

As to the Benj. Griffin map opposite page 234. First: In my original brief filed in this case, at page ....., I state that the copy of the map filed in the record is not a full size copy of the actual map filed in the court below, that map being upon a scale of 80 ch. to two inches. The map here is upon a scale greatly reduced in size and is only on the scale of 80 ch. to 1.4 inches, two inches to the mile being the scale of nearly all government maps.

Comparing this map with the map opposite page 176, it will be found that the two maps correspond exactly, except as to the scale upon which they are drawn, *so far as that part of the township lying on the main land is concerned,* excepting alone as to Section 35. The mainland in map opposite page 176 is divided into thirty-five sections and the mainland in the map opposite page 234 is divided into thirty-five sections, and the traverse of the main land bank is identically the same in the two maps, as is the dividing of certain sections into lots, and the traverse of Lake Bolivar. The difference in the two maps consists in the representation of Island 76 and of Section 35. In the map opposite page 176, Island 76 is simply sketched in, without attempting to give its form or shape, and Section 35 is not divided into lots. In the map opposite page 234 Island 76 is carefully platted and is divided into Lots 1 to 8, inclusive, Section 36 and one to three, inclusive, Section 37, T. 21, R. 8 West, and the course and distance and shape of the island are carefully and distinctly and fully platted, and Section 35 is divided into lots.

Now, then, what does this map opposite page 234 represent and from what field notes is it projected?

Mr. Shackelford, in his deposition at page 251, in answer to interrogatory No. 9, says:

> *"I made an independent plat from the notes of the river bank and a traverse of Island 76 from the field notes, not a tracing, and after comparing it with the map itself, found them to agree,"*

and he further says that the map is made from the *whole of exhibit "B" to Mr. Nall's deposition.* Now, then, turning to page 213 of the record, the field notes 8/B, being the field notes of T. 22, R. 8 W., Mississippi, made by Benj. Griffin in October, 1830, and we find a survey of Island 76; that Island 76 was surveyed in October, 1830, and carefully sectionized as a part of Sections 6 and 7, T. 22, R. 8 W., Mississippi, the surveyor running entirely around the island by course and distance and carefully designating the topography of the island. Thus, at the bottom of page 213 the words *"Above high water mark,"* and on page 214 *"This line was open woods with vines and briars, in places above high water mark, overflow from* 1 *to* 4 *feet, soil good."* Further down page 214, *"This line was open Cottonwood swamp. The South and East side of the island is an open Cottonwood swamp—heavy-timbered, subject to overflow from* 1 *to* 4 *feet. Soil generally good. The north and West side is mostly cane, above high water mark, soil very good,"* and on page 215, *"The traverse around the S. is mostly open woods, some cane, subject to overflow in many places, Stiff, rich soil."*

Now, all of this is not taken from the draftsman who made this map, but is taken from the field notes

of Benj. Griffin, Deputy Surveyor, who in October, 1830, *surveyed Island 76 as a part of the State of Mississippi.* These field notes form a record of what Benj. Griffin, in October, 1830, saw, on the ground, and what he did on the ground. And if one map was destroyed, any competent draftsman could reproduce from these field notes another map giving exactly the same conditions and pictorially representing to the eye what Benj. Griffin saw and did in October, 1830, on T. 21 and T. 22, R. 8 W., Mississippi, just as only a few years ago, Mr. Shackelford, at the time of the taking of his deposition, reproduced independently and without tracing, a map similar in every respect to that opposite page 234 from the entire field notes filed as exhibit "B" to Mr. Nall's deposition. *It is not then a question of maps, but of surveys and of field notes of original surveys.*

But what else did Benj. Griffin, Deputy United States Surveyor, do in 1830?

He not only surveyed Island 76 as a part of the State of Mississippi and sectionized it as such, but he connected the island by course and distance with the main shore, fixing the position of the island as it then was for all time and giving its exact relation to the Mississippi shore. Thus, page 213, the field notes say:

> "*distance X the shoot of Island 76 from the beginning of the last St. N. 40 E 2920 intersecting the opposite traverse 26 ch. on the 1st St.*"

Written out thus:

> "*Distance across the Shoot of Island 76 from the beginning of the last Station North 40 degrees East 29.20 Chains, intersecting the opposite traverse 26 Chains on the First Station.*"

Mr. Griffin, who surveyed the river bank, has said that the body of water between Island 76 and the Mississippi shore, was the "shoot of Island 76," and further, the *original field notes contain this distinct statement:*

> *"Island 76 is in Township 21, Range 8 West, and not in Township 22, Range 8 West, and that instead of sections 6 and 7, should be sections 36 and 37 Township 21, Range 8 West. This island is properly within Township 21, Range 8 West."*

THAT IS TO SAY, THAT MR. GRIFFIN DISTINCTLY STATES THAT ISLAND 76 IS WITHIN THE STATE OF MISSISSIPPI, AS SECTIONIZED AND SURVEYED BY HIM IN OCTOBER, 1830.

Further as to the Benj. Griffin map opposite page 234. The attention of the court has been called to the fact that this map in the record is a reduced copy. The map actually filed consists of a pen and ink tracing from the original map on file in the original map book of the Surveyor General in Jackson, Mississippi, and a *certiorari* has been prayed that the said map may be sent up to this court. That this is correct see the certificate of E. H. Nall, Land Commissioner, page 235 of record. This map is signed by Joe Dunbar, Surveyor South of Tennessee, and contains this note: "Note—T. 22 R. 8 W. is recorded in book containing maps of Choctaw Cession 1830," and this same original map contains Section 35 S. Choctaw Boundary divided into Lots one to nine, inclusive. Why this "Note —T. 22 R. 8 W. is recorded in book containing maps Choctaw Session 1830"? Clearly because Island 76, the field notes of which is in the survey of Section 22, R. 8 W., has been platted in the *original map* in

the Surveyor General's office as properly a part of T. 21, R. 8 W., to which it of right belongs.

But how about Section 35 of T. 21, R. 8 W., and the difference between that in the map opposite page 234 and in the map opposite page 176? The court has gone out of the record for historial data, and properly so. It will do so in this instance. Upon application at the land office in Washington, the court will find a supplemental plat of Section 35, dividing this section as it is shown in the map opposite page 234 into Lots 1 to 9, inclusive, South Choctaw Boundary and containing the following certificate:

"Surveyor's Office,
JACKSON, Mi: June 2, 1847.

I certify that the above diagram is correctly copied from the approved recorded plat of T. 21 R. 8 W. on file in this office.

C. A. BRADFORD,
Surveyor South of Tennessee."

and this map, or plat of Section 35 will be found to show the markings of red and black ink in said section as it appears in the map filed in this suit, a copy of which purports to be in the record opposite page 234, and which map is the orignal map in the original plat book in the Surveyor's office then in Washington, Mississippi.

It is not necessary to call the attention of the court to the fact that all the original field notes, maps, etc., of the surveys were retained in the Surveyor's offices in the various states and that copies were sent to Washington, D. C., and that these original field notes and plats so far as the states are concerned are now in the custody of the various states in the proper department, and that the plat and field notes introduced

by Mr. Nall are from the originals made by the surveyor at the time.

One other suggestion—showing that the error in the plat opposite *176* was discovered about 1832. We find the notation on that plat as follows:

> "Surveying the boundary lines, all sectional lines, connections to the front sections, Traverse of both sides Bolivar Lake & Traverse Miss. charged by B. Griffin, No 3 1832. Also traverse & retraverse of Island 76 (followed by word or words I cannot decipher)".

Thus showing that Benj. Griffin had charged his survey of Island 76 and being noted on the partial map of T. 21, R. 8 W., first sent in to Washington, D. C., and that at that early date they had the information conclusively establishing beyond the shadow of a doubt that the Official Surveyor of the United States sectionized and platted Island 76 as a part of Mississippi under the United States statutes in October, 1830.

Now, then, to return to that part of the opinion of the court first quoted above. It is quite apparent that the court was misled by supposing the 2920 in the record to refer to feet and by the confused way in which the field notes are printed. We, therefore, find the facts to be:

The Benj. Griffin map opposite 234 was projected from the *original field notes of the T.* 21 *R.* 8 *West,* as surveyed and sectionized by Benj. Griffin in January and February, 1830, *and in October,* 1830. This is proved by the fact that Mr. Shackelford, taking the field notes filed as exhibit "B" to Mr. E. H. Nall's deposition, reproduced from them an original map corresponding with the map herein filed. (See Mr. Shackelford's deposition, ..., page .....)

Second: The island was sectionized under the United States statutes by Benj. Griffin, deputy United States surveyor, in the field notes filed as Exhibit "B" to Mr. Nall's deposition, first as Sections 6 and 7 of Township 22, Range 8 West and then changed to Sections 36 and 37 of Township 21, Range 8 West, State of Mississippi and the island was considered by Benj. Griffin as a part of the State of Mississippi. *This fact is clearly and positively established by the original field notes of the surveys made by Benj. Griffin and filed herein as 8/B of Exhibit "B" to Mr. E. H. Nall's deposition.*

Third: The Benj. Griffin map at page 234 is not counteracted by the map opposite 176, but it is clearly shown by the field notes that Benj. Griffin, who made both surveys thought the island first a part of T. 22, R. 8 W. instead of T. 21, R. 8 W. and surveyed it as a part of T. 22, R. 8 W.

Fourth: The distance across the east channel at the top *is not* 2,920 *feet*, but the distance across the shoot *is* 29.20 *chains*, or 1927.20 feet.

Fifth: We believe that with the correction as above shown it is clearly demonstrated that the Benj. Griffin map opposite page 234 is a complete map projected from the entire field notes of T. 21, R. 8, W. Boliver County, State of Mississippi.

But, may it please the court, whether the island was sectionized as a part of *T.* 21, *R.* 8 *W.* or as a part of *T.* 22, *R.* 8 *W.*, the fact stands out boldly and prominently, and without contradiction in any form, shape or manner in the record, that Benj. Griffin, deputy surveyor of the United States, in October, 1830, on

the ground and at the place, surveyed and sectionized Island 76 as a part of the State of Mississippi, declaring the island to be within the said state, and designating the "east channel" as the "shoot of Island 76" and not designating said channel as the Mississippi River.

Besides the distinct statement of Mr. Griffin that the island was a part of Mississippi and his giving the distance across the shoot, the physical facts entered in the original field notes with regard to the formation of the island shows conclusively that the channel was west of island 76 and had been west of the said island for a long time prior to that date, for it is noted that the high land is at the north and west of the island and the low land to the south and east. It is a well known and universal natural fact that on all alluvial streams, the highland immediately adjoins the channel of the stream and the drainage is away from the channel. This is necessarily so, because when the water charged with sediment overflows the channel the current stacking it deposits the sediment nearest the channel and becomes less full of sediment and the further it goes from the channel it deposits less and less, thus making the drainage away from the channel. (See depositions of Mr. Shackelford and Mr. Andrews, and any work on alluvial streams.)

As Mr. Griffin states, the channel of the river was west of Island 76 in 1830, the topographical conditions show that it must have been west of the island for a long number of years prior thereto in order that the deposits from the river should have made the western bank higher than the eastern bank.

Now, then, may it please the court, counsel in their brief constantly refer to the Pelham survey as the "Government Survey" and the Benj. Griffin survey as shown opposite page 234 as the "map opposite page 234."

Certainly the Pelham survey was a government survey, made by Mr. Pelham, surveyor of lands for Arkansas, but the map opposite page 234 is projected from the field notes of a survey made by Benj. Griffin, deputy surveyor of the United States for Mississippi, and if Mr. Pelham's survey is a government survey, which it is, certainly Mr. Griffin's survey is a government survey. In fact, it is from these surveys and these field notes that T. 21, R. 8 W., and T. 22, R. 8 W., and the other townships mentioned above of Mississippi are sectionized and this survey is clearly a government survey of Mississippi made in 1830 and the original field notes of this survey are as binding and as authentic as the field notes of the Pelham survey, or any other. I refer again to the certificate of Mr. Nall, certifying that he has in his keeping the records of the "Surveyor General's Office," and that the field notes attached as Exhibit "B" to his deposition are copies from the *original field note books* in his keeping and possession.

There seems to be in the mind of the court, the idea that because the original field notes of the survey of the mainland of T. 21, R. 8 did not sectionize the island, that at that time Mr. Griffin must have considered the island not as a part of the State of Mississippi. It is suggested among other things as the reason why Mr. Griffin did not survey this island as a part of Missis-

sippi at the time he surveyed T. 21, R. 8, that the survey was made in January and February and it is a well known fact that almost universally the river is very high and often out of its banks at that time of the year and rarely or never is it at a medium or low stage of water. It may be then that Mr. Griffin did not survey the island in January and February because of the stage of the water which would have prevented him from surveying any portion of the island except alone the highest part. On the other hand, it may be also, that the island extending north and thinking that it extended into T. 22, he intended to sectionize the entire island as a part of T. 22, but whatever the reasons were, it is perfectly apparent *that in October* 1830, following the survey of T. 21, R. 8, in January and February, at what is universally a low stage of the water on the river, Mr. Griffin then considered the island as a part of the State of Mississippi, not as a part of Township 21, R. 8 W., but as a part of Township 22, R. 8 W., because he *first sectionized the island as Sections* 6 *and* 7 of T. 22, R. 8 W. Thus it would seem that he thought the island originally not a part of T. 21, but of T. 22 and that it was only after the survey had been completed and the island joined to the main shore by course and distance, that he discovered that the island should have been sectionized within Township 21, Range 8, West, and this being the case, it would seem that the reasons why he did not sectionize the island originally as a part of T. 21 are not necessary to be suggested as he himself furnishes the reason by first sectionizing the island as a part of T. 22, R. 8 W., conclusively showing that he originally thought it a part of T. 22 and not a part of T. 21. The map opposite

page 176 was made May 31, 1830, and from the 17/F exhibit to Mr. Nall's deposition and prior to the survey of October, 1830, and sent on to Washington, D. C., at that time. The law requiring two maps to be made one to be sent to Washington and the other kept in surveyor's office. In October, 1830, the island being surveyed as a part of T. 22, the first map projected from the field notes 17/F had been completed, and hence, could not contain any reference whatever to the survey of Island 76. Subsequently when the island was surveyed as a part of T. 22 and found not to be in T. 22, the changes in the field notes were made and the plat opposite page 234 was projected from the entire field notes, *i. e.,* the island was platted in the original map on file in Jackson, and is now filed and has been on file, in the records of the Surveyor General's Office in Jackson, Miss., so far as is known from the earliest date.

But whether a plat had ever been made from the field notes so entered, the fact remains that the field notes furnish the survey and sectionizing and that the island was surveyed and sectionized in 1830 *in October as a part of Mississippi.*

We come now to discuss the ingenious argument of counsel upon the scaling of the various maps, which argument is to be found on page 43 of their brief.

The argument shows errors of distance quite difficult to understand in one who has familiarized himself with the original testimony as introduced into the court below and also shows such delightful innocency with re-

gard to surveying and platting, that it is unusually interesting. Counsel says:

> "Upon the Choctaw map of 1830, facing page 176, it is shown by scale, as follows:
>
> 1. That at the head of the East channel (as shown by field notes) 2,920 feet. (p. 213.)
>
> 2. That at the narrowest point measured, it was 1,320 feet.
>
> 3. That at the foot of the island it measured 1,650 feet."

First: A. The distance 2,920 referred to at page 213, as shown, refers to 29.20 chains and is not 2,920 feet. B. The distance whatever it is, has no application to the map opposite page 176, but has reference to the map opposite page 234, the map opposite page 176 being projected from the field notes Exhibit 17/F, beginning at page 216 and was completed before the survey notes beginning at page 213 was ever begun (see above), and therefore the distance stated in the field notes 8/B, at page 213, was unknown to Mr. Benj. Griffin at that time, and was unknown to the draftsman who projected the map from the field notes and hence, when counsel says "At the head of the east channel it was (as shown by field notes) 2,920 feet," his statement is shown by the record to be clearly a misconception of facts, so far as the application to this particular map is concerned. So the field notes from which this map was projected, that is 17/F, did not give the distance across the shoot at any point and there is no attempt to draw the island in as a part of the map. The form and shape of the island, nor the island shore line are nowhere attempted to be given and the island is not referred to, nor connected in any way by these field notes, or this map, by course and

distance, or otherwise, with the main shore; hence the scale placed upon the map attempting to give the distance from the mainland across the shoot to the island, is of no value whatever, and is of no more value than *the scale placed on the east bank of the island to get the width of the island across to the west bank* and is of no more value than the scale placed upon *the west bank of the island to get the width across to the east bank of Arkansas,* the draftsman who sketched the island in, showing remarkable impartiality between the width of the shoot, the width of the island and the width of the Mississippi River on the west.

The shape of the island as actually surveyed in October, 1830, appears in field notes 8/B beginning at page 213 and the width across the "shoot" is there shown.

The scale applied to the map opposite page 176 is absolutely correct within the limits of platting, when applied to that part of the map projected from the field notes 17/F. That is to say, the distance across sections 26 and 27, or the distance from section 33 to the east bank of Lake Bolivar or to any other point on the mainland, can be obtained accurately, but only is it accurate when applied to that part of the map actually projected from the field notes. To demonstrate the absurdity of attempting to place the scale on this part of the map, it is only necessary, first, to attempt to scale the distance from the head of the island to the Arkansas shore and we find that it would be 10 chains, or 660 feet, when we know that the distance from that point across to the Arkansas shore, as triangulated by McRae and as shown by Pelham, is some five or six times this distance, for we know that the channel on

the west side is very broad. It would be demonstrated equally as forcibly by scaling the distance across the island from east to west or the distance across the island from north to south. Thus, then, whether or not the distance scales at the narrowest point of this map 1,320 feet, or at the foot 1,650 feet, is totally immaterial for it has no bearing whatever on the case, and there is no attempt on the part of the surveyor, or the party who platted this map to plat this part of it to a scale. Thus, then, it would seem that the argument as to this map is a kind of cuttle-fish performance—a muddying of the waters, first, by a distinct misconception as to the distance across "the shoot" and second, by attempted measurements at two points between the mainland and the island.

See Mr. Andrews' deposition, page 274, interrogatories 1 to 5 inclusive, and see field notes 17/F page 216, *et seq.*

Counsel continues:

> "By McRae's map of 1829, facing page 70: 1. At the head of the island 1,320 feet. 2. In the middle of the island 1,280 feet. 3. At the lower end, 1,650 feet."

First: With regard to this map, the distances being taken by triangulation from points on Arkansas shore to points on the Mississippi shore and the island, the following distances can be obtained. That is to say, from a point at the head of the island to a point N. on the main shore of Mississippi, from a point at the extreme foot of the island to a point nearly directly south on the main shore of Mississippi. That is, these distances can be obtained provided the map is drawn to the proper scale and the scaling properly done the

distance can be obtained accurately within the limits of triangulation and plating for such long distances.

The map itself states that it is 40 chains to the inch, or 80 chains to 2 inches. (I refer now to the map actually in the record opposite page 170.) This, however, is an error for the map is not drawn to the scale of 40 chains to the inch, or 80 chains to two inches but is drawn to a scale of 80 chains to 1.6 inches and this the court can prove for itself by placing the scale on the map. That is the distance across section 33 in every direction is 80 chains, it being a square section one mile in width and that distance measures 1.6 inches. The same is true of Section 32, of Section 29 and of all other sections and parts of sections platted on the map and this is absolute proof of the scale upon which the map is drawn.

If we then take the scale of 1.6 inches to 80 chains, we have the distance across from the head of the island to the point N. on the main shore of Mississippi to be 25 chains, or 1,650 feet. If we place the scale in the same way on the point at the foot of the island to the point named on the main shore, the distance is 30 chains or 1,980 feet. On the other hand, if we take the map to be drawn on the scale of two inches to the mile, the distance at the head and foot of the island would be as given by counsel. The chiefly erroneous part of counsel's argument being the attempt to scale the distance from the middle of the island to the main shore of Mississippi and designating it as 1,280 feet. It is perfectly plain without reiterating the argument made with reference to the former map, that there is no attempt to draw to a scale the points in question. The

surveyor was on the main shore of Arkansas and he in no place attempted to triangulate from the west bank of the island to the east bank of the island for the purpose of getting the distance across the island from east to west, nor did he triangulate from any point on the east shore of the island to the main shore of Mississippi. The line of the east bank of the island simply being drawn, and the main shore line of Mississippi simply being drawn in the form of a curve without any regard to scaling or distance whatsoever, and so far as the surveyor on the Arkansas shore was concerned, the island might have attached at that point to the Mississippi shore, or it might have been several miles away.

The important part of this scaling so far as this map is concerned will be touched upon in a subsequent part of my argument; for the present I am pointing out the ingeniousness of counsel's scaling feats.

To continue with counsel's brief:

"By the map facing p. 234:
1. At the head of the island, 2,900 feet.
2. At the narrowest point 530 feet.
3. At the lower end, 990 feet."

First as to No. 1: An examination of the map itself shows at the head of the island the following figures in the shoot: "N. 40° E. 29.00." Counsel have inadvertently taken this 29.00 to mean 2,900 feet. Just how this error is made by counsel it is difficult to understand and especially in view of Mr. Andrews' deposition on page 261 where it is carefully and precisely pointed out that this 29.00 means 29 chains. Counsel might as well say that the other letters and figures

beginning at the north line of T. 21, R. 8, on this same map, means 26 feet or 26 inches or 26 yards or 26 miles. There is no more reason to say the 29.00 means 2,900 feet than to say it means 2,900 inches. It is clear the surveyor is measuring as a surveyor and means chains. The letters and figures are: "N. 51° W. 26" and clearly means north 51 degrees, west 26 chains. Thus we are brought back to the field notes on page 213, and quote: "N. 40°, E. 2920, intersecting the opposite traverse 26 ch. on the first Station." The 29 chains of the map is evidently intended for the 29.20 chains in the field notes.

Second: "Narrowest point, 530 feet." Mr. Shackelford scales this distance 8 chains or 528 feet; Mr. Levasseur, as 530 feet. And this scaling, if the court please, was not done on a reduced map, such as that filed in the record, but upon the map originally introduced in evidence and was on the scale of 80 chains to two inches. This map furnishes the only map in the entire record where the distance across the shoot from the east bank of the island to the main shore of Mississippi can be scaled accurately within the limits of surveying and platting at any point on the east bank of the island to the main shore of Mississippi, or to any point within the township on the main shore of Mississippi, and hence the distance of 8 chains or 528 feet, is accurate within the limits of surveying and platting. If the plat projected from the field notes is a correct plat, then the distance is obtained almost as accurately as if measurement was made directly from point to point. The shape of the island is obtained by course and distance and the island is joined to the mainland by course and distance and the bank of the

shoot on the mainland is obtained by course and distance. Thus, then the island bank, being carefully platted and the west bank of the main shore of Mississippi being carefully platted and the two joined together by and according to the field notes and by course and distance and drawn to scale, the scale gives the distance between any point on the main shore and any point on the island shore as positively as it gives the distance to any point in any of the sections on the mainland, or any point on any section line from one section to the other. Thus, then, by actual measurement the distance across the head of the shoot in 1830 is 29.20 chains or 1,927.20 feet. The distance across the narrowest point in 1830 was 8 chains or 528 feet. (See Mr. Andrew's and Mr. Shackelford's depositions.) The distance across the lower end by scaling upon the large map introduced into evidence, I make the distance directly across the channel at the foot of the island about 18 chains, or 1,188 feet. On the map here introduced into evidence I make the distance directly across the channel at the foot of the island 17.50 chains or 1,131 feet, and I can only account for the counsel's error in scaling by his failure to understand the scale upon which the map introduced in evidence is drawn. Or it may be that we have not taken the same point exactly. The small difference is immaterial. I wish to note here that the distances just given are not from the same points as shown in the McRae map but are from points directly across the channel from the east bank of the island. Thus, then, it may be said of this map that it is the only map in the record upon which the scale can be accurately placed for the distance across

the shoot to the Mississippi shore, and to any point within the township.

But it would be ridiculous and absurd to attempt to scale from this map the distance from any point on the island across the Mississippi River to the Arkansas shore, the distance across the Mississippi River to Arkansas not being drawn to scale, and the line drawn there, being merely sketched in to show that there is a shore line at some indefinite point to the west of the river west of Island 76.

In this connection, it may be well to call the court's attention to the directions of the surveyor general for the government of original surveys. The order here quoted is taken from the rules promulgated in 1894, I believe, and is taken from page 224 Hodgmans' Manual of Land Surveying (*supra*). It is believed that the same rule prevailed in the early days, although I cannot verify it here. The land office can quickly furnish the fact.

> "Meanderings * * * 2. Navigable rivers as well, etc. * * * the right angle width of which is three chains and upward will be meandered on both banks at the *ordinary mean highwater mark*, etc. * * * and, 4. Meander lines will not be established at the segregating line between dry and swamp or overflow land, but at the *ordinary highwater mark* of the actual margin of the rivers or lakes on which such swamp or overflow lands border."
>
> Hodgman Manual, page 225.

So the lines given by the field notes and map indicate the ordinary highwater shore line and disregards any sandbars that may extend out towards the shore as are shown to be in existence at the head of the island, from maps hereafter mentioned.

To continue with counsel's brief:

"The government survey of 1846 (meaning the Pelham survey) facing page 172 shows the following:

1. At the head of the island, 2,960 feet.
2. At the middle of the island, 2,112 feet.
3. At the lower end of the island, 2,970 feet."

The same remarks applicable to the map opposite page 176 apply here. It is simply beyond understanding that counsel so misunderstand surveying and platting as to attempt to place the scale upon the map to obtain the distance between the island bank and the Mississippi shore in this case. It is equally as absurd as to attempt to place the scale on the Benj. Griffin map of 1830 to find the distance from the west shore of the island to the main shore of Arkansas. Now, on this Pelham map being the map opposite page 172, counsel can scale accurately any distance from any one point on the island to any other point on the island, or from any point on the island to any point on the mainland of Arkansas, for the simple reason that the island is here surveyed by course and distance and is connected with the main shore of Arkansas in the same way, it being surveyed in 1846 by this surveyor for Arkansas in exactly the same manner that it had been surveyed in 1830 by Benj. Griffin, deputy United States surveyor for Mississippi. In 1846, Mr. Pelham found the channel east of Island 76 and supposed it to be part of the State of Arkansas. In 1830, Mr. Benj. Griffin found the channel to be west of Island 76 and knew it to be a part of the State of Mississippi, and sectionized and platted it accordingly. Thus, then, we find that counsel's argument with regard to scaling plats in which he attempts to muddy the waters, is simply an argument

unfounded on any facts in the record. When fully understood, the fact boldly stands out that the only map upon which accurate distances by measurement and scale can be obtained from all points on the island to all points on the main shore of Mississippi, *is the Benj. Griffin map and survey of* 1830 and the only map upon which all distances can be obtained from *all points on the island to all points on the main shore of Arkansas, is the Pelham map of* 1846. The McRae map of 1827 giving three points on the island where distances can be obtained to points on the Arkansas shore and three points on the island where the distance can be obtained to two points on the Mississippi shore. But the map opposite page 176, being a map projected from the field notes 17/F, there is no point on the island the distance from which can be obtained by scaling to any point on the main shore, nor from any point on the island itself to any other point on the island.

To return to the Benj. Griffin survey of January and February and October, 1830, we have the following facts clearly proved:

First: That Benj. Griffin, deputy surveyor of the United States surveyed Island 76 carefully as a part of the State of Mississippi and has left record and official evidence that he, in October, 1830, considered Island 76 as a part of the State of Mississippi.

Second: He gives the distance across the "shoot of Island 76," thus clearly stating that the body of water, between the island and the shore of Mississippi is not the channel of the Mississippi River.

Third: He positively states in so many words in

the field notes that Island 76 is a part of T. 21, R. 8, Mississippi.

Fourth: The topography of the island as shown by the field notes, establish that the higher portion of the island is to the north and west and the lower parts to the south and east, demonstrate that the channel was not only west of Island 76 at that time, but had been west of Island 76 for a long time prior thereto.

Fifth: The distance across the shoot is so narrow that the main body of water of the Mississippi River could not have passed east of the island. This distance scales at 528 to 530 feet, but allowing for any reasonable error in platting, and an error could hardly exceed, one way or the other, more than 100 or 200 feet, and in order to make the channel wide enough for the main channel of the river to pass east of the island, there would have to be an error of something like 700 feet, even, supposing that the river would have run at this point within the narrowest channel known, and an error of a great many more feet, if the average width of the channel is considered. (See C. H. West's deposition.)

If there was any error in the platting, Mr. Shackelford, who made a new map from the field notes, did not discover it, nor did counsel have anyone to plat the field notes and thus to show the error. The field notes were before him, and LeVasseur or any other competent surveyor, could have determined whether or not the map opposite page 234 was a correct projection from the field notes in question.

Having thus shown the court the error into which it was inadvertently led with regard to the survey and

map of 1830, I deem it proper to refer to other evidence introduced by the defendants and appellees in this case, substantiating through the years prior to 1830 the positive and record proof of Benj. Griffin and his survey, that the channel was west of Island 76 in 1830 and for a long series of years prior thereto. But before doing this, I understand that it is admitted that the question to be determined, is

> *"where was the middle of the main channel of the Mississippi River in* 1817, *the date Mississippi was admitted to the Union?"*

That this is the question for determination, we understand, is admitted by counsel and by the court in the opinion rendered in this case and we shall address ourselves to that fact, deeming it established that the Griffin survey has established the channel west of Island 76 in 1830. Unless there is some proof adduced in the record that the channel changed between 1830 and 1817 and was east of the island in 1817, it must be presumed, without any further evidence that it was west of the island in 1817, but the record is full of evidence that the channel remained west of the island for a long time prior to 1830.

Beginning this discussion with the earliest evidence before us and which is taken by me from the opinion of the court in this case, we find that in 1806, Cramer's Navigator says that the channel is good on both sides. In 1808 and 1811, it is said that the left side, that is the east side, is the best in low water. We have nothing after that date until 1814, when Cramer's Navigator for the year 1814, being the same work, states that the best channel is on the right side at all stages. The same work reasserts this in 1817 and 1818. Thus, then, we

have the fact that Cramer's Navigator, which was used by pilots for purposes of commerce, states in the very year that Mississippi was admitted into the Union that the west channel was not only the broadest, but the deepest and best to use in all stages of the water, and hence, was the channel of commerce and the one through which the greatest body of water ran. The court says that "in view of this statement for the very year in which Mississippi was admitted into the Union, it is impossible not to hesitate." Indeed, we believe had the court not misunderstood the field notes of the Benj. Griffin survey, that it would not have hesitated, but would have held promptly and positively that this confirmatory evidence of the Benj. Griffin survey conclusively established the channel west of Island 76 in 1817. But, may it please the court, the years 1814, 1817 and 1818 are not the only years in which we have evidence confirming the channel west of the island, and in following the evidence year by year, we have in 1822, Samuel Cummings' Western Navigator, stating that the channel is on the Arkansas side. Where was the channel in 1821? Captain Young, Captain Poussin, and Lieutenant Tuttle confirm Samual Cummings and say it was west of Island 76 in 1821, and they further say that it was west of the island in the lowest stage of water in common years.

> "The soundings on the bars were made during the months of October and November and it is believed that they are accurate for the lowest stage of water in common years."

This is taken from the Reconnoissance Map opposite page 288.

This map made on a small scale may not be accurate

for exact distances, but it is more than a coincidence that Captain Young, Captain Poussin and Lieutenant Tuttle confirm Samuel Cummings and both confirm Zadoc Cramer. But apart from this, this reconnoissance map is deserving of consideration in connection with the maps and surveys that follow, because of the physical facts shown by the reconnoissance map which bespeak the whereabouts of the channel as strongly or more strongly, than the line in the map designating the channel does itself. First, then, we find that these army officers went entirely around this island. They noted the dry sand bars, the line of shallow water to the east of the island and the sand bar to the east. Thus showing that they went entirely around the island. They noted the general shape of the island, it being concave on its western bank and no sand bar on the western bank, showing that there was no shoaling at that point. They noted the dry sandbar extending above the water out towards the Mississippi shore. This bar jutting out into the river towards the Mississippi shore indicates that the main body of water must have passed west of Island 76. These physical facts speak as strong as words and cannot be gainsaid. We thus, then, have confirming the official proof of the Benj. Griffin survey up to this time: Cramer, stating that the channel was west of Island 76 in 1814, 1817 and 1818; we have the testimony of Captain Young, Captain Poussin and Lieutenant Tuttle positively confirming that the channel, as they saw it when they examined the island, was west of Island 76 in 1821. We have the statement of Samuel Cummings that the channel was west of Island 76 in 1822. Thus, then, extending over a period of eight years, including the very year that Mississippi

was admitted into the Union, we have the positive statement of United States engineers and of navigators that the channel was west of Island 76.

There has been considerable attempt on the part of counsel to throw doubt upon this reconnoissance map. We presume that this map was prepared for the purpose of finding the best channel of the Mississippi for gunboats in time of war, and the statement of these gentlemen is certainly entitled to consideration. They could not take such soundings of the river as the Mississippi River Commission does to-day, but it is likewise evident that they made a very careful examination of the river at his point, at all events, and probably the entire distance, and it is hardly probable that they would have made an error in regard to the channel of the river, but if so, it would seem almost incredible that they and Samuel Cummings and Zadoc Cramer should all make identically the same error with regard to this channel, and it must be borne in mind that the evidence here adduced is the only evidence with regard to the channel of a contemporary character.

But we next come to the map of 1827, being the McRae map, and opposite page 170. Of this map the court says: "This map cannot be said to help either side except by speculation of an uncertain sort." We incline to believe that the court is correct in this statement, except that this map furnishes negative evidence that Mr. McRae, the surveyor who surveyed this island, did not consider it in 1827 as a part of the State of Arkansas and that he considered the channel of the Mississippi to run between the State of Arkansas and Island 76. There is strong evidence of this from the

triangulations made across from Arkansas shore to the Mississippi shore and to the Island shore. Thus showing that Mr. McRae was attempting to get the width of the channel at these points.

This map assists us in one other thing. It confirms in part the correctness of Captain Poussin's and Captain Young's reconnoissance map of 1821, in that it partially gives us the shape of the western bank of the island. That is to say, that three points on the western bank of the island are fixed by triangulations and from the points so obtained the draftsman jotted down the shape of the island as it appeared to him. While this line is not attempted to be fixed with any degree of accuracy, it would appear that Mr. McRae considered the western bank of the island to have somewhat the same shape at that date that it presented to Captain Poussin, Captain Young and Lieutenant Tuttle in 1821.

That some small changes took place between 1827 and 1830 in the island is shown from the fact that the distance across from the head of the island to the main shore is not quite the same in 1830 as in 1827, though this distance is quite near, considering the long distance triangulated across the entire river and conforms fairly well with the actual measurements made in 1830 by Benj. Grifin. Thus, the proper scale gives the distance across from the head of the island to a point N. on the main shore of Mississippi at about 25 chains and at the two points at the foot of the island at about 30 chains. On the Benj. Griffin survey, the distance at the head of the island is 29 chains, and from the foot, scaling from a point just at the foot of the island and in

identically the same direction as on the McRae map, is 26 chains. Thus, it would seem that there is not a great deal of difference in the distances between points at the time that McRae made his survey and when Griffin made his survey. The difference is about four chains, or 264 feet, and is probably due to the fact that the McRae triangulations were made at such long distance, and it may be that the measurement in 1830 was not made from the same points on the shore as those designated by McRae in his map of 1827.

There is one other reason why this map furnishes only negative evidence of the whereabouts of the channel and that is because the survey was made by Mr. McRae in February, 1827, and in February it is usual that our river is high, and for that reason it would be hard to determine where the real channel of the river was. The chief evidence of this map, therefore, is of a negative nature.

After 1830, we have the statement of Cummings, Western Pilot for 1833, and we read:

> "Channel either side. The right is nearest and the left probably deepest."

Thus, it would seem that the Western Pilot was in doubt as to whether the right channel was deepest or not. The words are: "Probably rather deepest," indicating that there was probably very little difference in the depth of the two channels at that date, and we know that if that was the case, *the great body of water would have passed down the west side of the island, because that was much the larger channel.*

The next reference to Island 76 is in 1835 from Captain Downing, who states that he was in Township 21

in that year and he found that the bank had not fallen in a great deal, showing that while he was there, and just prior thereto, there had been some caving going on, and that the channel was probably beginning to undergo a change—that is, that the bank was falling in, but that he considered the channel then west of the island.

We know nothing else with regard to the island until 1839 when Captain Miller passed down the river by the island as a boy of 12 years, and states that at that time the channel was east of the island, although there were two channels at that time. Continuously from that time the channel seems to improve on the left and gradually to leave the west side until in 1846, the channel on the west side is very shallow indeed, and continues thus until some time prior to 1881, when the channel again begins to change to the west, and finally, in 1881 and 1882, it is west of the island where it remains to this day. This change seems to have been in progress for several years.

Mr. LeVasseur has filed a map in this record opposite page 187 showing the shape of the island in 1881, when the channel had about completed its change to the west. The shape of the island is shown in the first black lines to the left of any of the red lines on the map. It is quite remarkable that the shape of the island in 1881 when the channel had changed to the west, should be almost identical with the shape of the island in 1821, as given by Captain Poussin, Captain Young and Lieutenant Tuttle, even to the extent of the sand bar jutting out at the head of the island, and at the foot of the island the similarity is remarkable indeed.

Considering then, the evidence as a whole, we have the following:

1. In 1814, the broadest and best channel at all stages of water and the channel of commerce west of Island 76—Zadoc Cramer.

2. In 1817, the broadest and best channel at all stages of water and the channel of commerce west of Island 76—Zadoc Cramer.

3. In 1818, the broadest and best channel at all stages of the water and the channel of commerce west of Island 76—Zadoc Cramer.

4. In 1821, the only channel west of Island 76—Captain Poussin, Captain Young, and Lieutenant Tuttle, army engineers.

5. In 1827, Mr. McRae, negative evidence of the survey of that year and the failure to sectionize Island 76 as a part of Arkansas indicates channel west of the island.

6. In 1830, Mr. Benj. Griffin sectionized and surveyed Island 76 as a part of the State of Mississippi, giving the distance across the shoot and positively stating the island to be a part of the State of Mississippi.

7. In 1835, Captain Downing's letter.

CONTRA.

1. Captain Miller says, as a boy of 12 years, in 1839 the channel was east of the island and that his father told him that it had been east as far back as 1812.

2. In 1833, "Channel either side. The right is near-

est and the left probably rather deepest''—Cummings' Western Pilot.

Thus, for a series of years extending from 1814 to 1830, inclusive, a period extending over 16 years—all of the official and record evidence introduced in proof and all the old river guides, directions for pilots and historical evidence found by the court, with a unanimity positively startling, place the main channel of the Mississippi River, the channel of greatest width, the channel of greatest depth, the channel of commerce, the channel through which the main volume of the waters of the great river must have flowed, west of Island 76. A unanimity such as this could not be a mere coincidence. It is proof positive and strong, for it is proof coming from different sources and all establishing directly the same fact, without a single break. It is beyond the realms of possibility that such evidence could be false. And thus it would seem that the official survey of Benj. Griffin in October, 1830, though overwhelming in its strength, is corroborated and borne out by all the other evidence of value in the record.

In view of the foregoing, I respectfully petition that the court issue the writ of certiorari and grant a reargument of the case.

Respectfully submitted,

ALEXANDER Y. SCOTT,
Attorney for Appellees.

J. M. MOORE,
CHARLES SCOTT,
E. H. WOODS,
B. W. L. BEDFORD,
Of Counsel.

"APPENDIX A"

APPENDIX

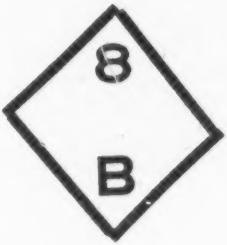
Consisting of Field Notes /8 B/,

Being a Part of Exhibit "B" to

E. H. Nall's Deposition.

EXHIBIT B. DISTRICT OF MISSISSIPPI

FIELD NOTES



Filed
Nov 4– 1905
W. P. Feild
Clerk

Field Notes of Township No. 22 in

Range 8 West in the Choctaw

District. State of Mississippi

Surv'd by

Benjamin Griffin,

Dep. Surv'r.

1 8 3 0

T 22 R 8 W

X Traverse of Island 76 beginning at the upper end.

St.	Course	Dis. Ch lks.
1	S 28–1/2 W	44.
2	S 38–1/2 W	5.
3	S 10–1/2 W	73.
4	S 28–1/2 W	22.
5	S 48–1/2 W	9.
6	S 38–1/2 W	17.
7	S 68–1/2 W	5.
8	S 57–1/2 E	3.
9	N 82–1/2 E	27.
10	N 68–1/2 E	26.
11	N 58–1/2 E	49.

Island 76 is in T 21 R 8 W & not in T22R8W and that instead Sections 6 & 7 Should be Sections 36 & 37 T21R8W

This Island is properly within Township No. 21 in Range 8 West

St.	Course	Dis
12	N 38–1/2 E	32.
13	N 10–1/2 E	25.
14	N 11–1/2 W	20.
15	N 25–1/2 W	25.
16	N 42–1/2 W	27.
17	N 56–1/2 W	12.
18	West W–	7.

Part of the Traverse of Island No. 76 See Note on the last page.

X X X

distance X the Shoot of Island
76 from the beginning of the
last St. N 40 E 2920 intersecting
the opposite traverse 26 ch
on the 1st St.

Note—This attached
piece of paper as
attached to the
original is
3-1/8 inches by
4 inches.

E. H. NALL,
Land Commissioner.

10 N 68-1/2 E 26.

11 N 58-1/2 E 49.

St.	Course	Dis	
12	N 38–1/2 E	32.	
13	N 10–1/2 E	25.	
14	N 11–1/2 W	20.	Part of the Traverse of
15	N 25–1/2 W	25.	Island No. 76 See Note
16	N 42–1/2 W	27.	on the last page.
17	N 56–1/2 W	12.	
18	West	7.	

X X X

at 21 ch set L post — Br Ellum N 1 W 107 lks
trees Gum S 44 W 130 lks

at 31 ch set L post — Br H–berry N 1 W 65 lks
trees Ditto S 69 W 29 lks

at 35 chs left the cain

at 41 ch set L post — Br H–berry N 46 E 28 lks
trees Ditto S 21 W 20 lks

at 51 ch set S post — Br Ellum S 4 E 26 lks
trees H–berry N 13 E 31 lks

Beginning at the S W corner of S 6. we ran S 57 E

at 58.24 Set S post — Br Cotton wood N 68 W 21 lks
tree Ditto N 6 W 13 lks

vines
This line was open woods with & briars, in places above high water mark, overflow from 1 to 4 feet soil good.

Beginning at the S E corner of S 6 we ran N 58-1/2 E. at 12 ch changed the course to N 38–1/2 E

at 7 ch Set L post — Br Cotton N 59 W 9 lks
trees Ditto N 7 W 11 lks

at 23 ch set L post — Br Cottonwood S 45 W 10 lks
trees Willow N 16 W 12 lks

at 32 ch changed the course to N 10–1/2 E

at 3 ch set L Post — Br Cottonwood N 54 W 26 lks
trees Ditto S 86 W 32 lks

at 14 ch set L post — Br Willow S 77 W 9 lks
trees Cottonwood N 30 W 12 lks.

at 25 ch set L post Br Cottonwood N 50 W 9 lks
trees Ditto S 83 W 10 lks

Changed the course to N 11–1/2 W

at 14.50 set L post Br Willow S 33 W 13 lks
trees Ditto N 68 W 25 lks

at 20 ch changed the course to N 25–1/2 W

at 17.50 set L post Br Cottonwood S 59 W 27 lks
trees Ditto S 83 W 24 lks

at 25 ch changed the course to N 42–1/2 W

at 27 ch changed the course to N 56–1/2 W

at 12 ch changed the course to W

at 7 ch closed the S. This line was an
This Island

Open Cottonwood Swamp

The South & East side of this Island is an open Cottonwood Swamp heavy timbered subject to overflow from 1 to 4 feet. Soil generally good

The North and West side is mostly cain above high water mark, soil very good.

37

Beginning at the N. W. corner of #S 7 we ran S 10–1/2 W

at 16 ch set L post Br H–berry N 56 E 16 lks
trees Ditto S 14 E 18 lks

at 22 ch changed the course to S 28–1/2 W

at 22 ch set L post Br Cottonwood S 59 W 27 lks
trees Ash S 83 W 24 lks

Changed the course to S 48–1/2 W

at 9 ch changed the course to S 38–1/2 W

Section 7 should be Section 37 T 21 R 8 W.

at 17 ch changed the course to S 68–1/2 W.
at 5 ch changed the course to S 57–1/2 E
at 3 ch changed the course to N 82–1/2 E
at 27 ch changed the course to N 68–1/2 E
at 20 ch set L post Br Cottonwood N 24 E 4 lks
trees Ditto N 88 E 5 lks
at 26 ch changed the course to N 58–1/2 E
at 21 ch set L post Br Willow N 83 W 34 lks
trees Ditto N 5 E 40 lks
at 37 ch Closed the S.

The traverse around the S is mostly open woods, some cain subject to overflow in many places————

Stiff rich Soil

X X X X X X X X X X X X X X X X X X X X X X X

Finis

T 22 R 8 W.

1 8 3 0

October 30.

I, E. H. Nall, Land Commissioner, and having in my official keeping as such the records of the "Surveyor General's Office" do hereby certify that the above and foregoing pages are a true

and faithful copy and transcript of and from the said record in so far as it is shown and appears of record in Field note book " " of the original surveys now on file and in my official keeping as a part of the record of the State Land Office. The same is a true and correct copy in every line and figure and in strict conformity with the original

Given under my hand and official Seal at Jackson Mississippi this 13 day of May A D 1902

(Seal) E. H. NALL

Land Commissioner.

UNITED STATES OF AMERICA
WESTERN DIVISION OF EASTERN DISTRICT OF ARKANSAS.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing seven pages is a true, correct and compared copy of Exhibit B, designated thus in case of Moore & McFerren v. R. J. McGuire, et al, now on file in my office.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 6th day of May A. D. 1907, and of the Independence of the United States of America, the one hundred and thirty-first.

(Seal) W. P. FEILD, Clerk.